Vehicle Financing and Leasing Litigation - Is the Water Boiling Yet?[1]

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I. The TILA Closed End Disclosures – Timing and Manner of Delivery

By now, nearly everyone has heard about the case *Polk v. Crown Auto, Inc.*, 221 F.3d 691 (4th Cir. 2000), in which the Fourth Circuit issued a novel appellate interpretation of Section 226.17(a) of Regulation Z. This provision requires that closed-end transactional disclosures be made to consumers "in writing, in a form that the consumer may keep." 12 CFR § 226.17(a)(1).

In *Polk*, the debtor argued that the creditor was required to make the TILA disclosures in writing and a form that the consumer may keep *prior to consummation*. The district court had rejected this argument, holding that the dealer could make the disclosures before consummation, and provide the consumer with the disclosures in a form that the consumer could keep after consummation. In reversing this decision, the Fourth Circuit ruled that "the plain meaning of the regulation must be understood to be that written disclosure in the form specified in subpart (a) must be provided to the consumer at the time specified in subpart (b)" (*i.e.*, before consummation of the transaction). *Polk*, 221 F.3d at 692. The Fourth Circuit further noted that its interpretation was consistent with the congressional intent because "[b]y having the terms of credit disclosed in a form that he can take with him, the creditor [sic] can more readily compare those terms to the terms offered by other sellers."

In an opinion not selected for publication in the Federal Reporter, *Gavin v. Koons Buick Pontiac GMC, Incorporated,* 2002 WL 46759 (4th Cir. (E.D. VA)), the Fourth Circuit appears to have overruled its decision in *Polk* by implication.

In *Gavin,* the buyer of a Mazda truck from Koons Buick Pontiac GMC brought an action in federal district court alleging violations of federal odometer law, the Truth in Lending Act and state law, and breach of contract and fraud claims. The district court

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[1] This paper was originally presented at the Conference on Consumer Finance Law, Short Course on Consumer Law Program, March 18-21, 2002, Palm Springs, California.

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dismissed most counts, and the rest were dealt with by the Fourth Circuit Court. Then, without mentioning *Polk* or the many cases spawned by that decision, the court ended the opinion by stating:

> Finally, Gavin argues that the district court erred in grating Koons judgment as a matter of law on Gavin's remaining TILA claims. As stated above, the disclosures were made before credit was extended, as required by the Act. 15 U.S.C. § 1638(b)(1). The regulation that interprets the statutory provision requires disclosures "before consummation of the transaction" and "in a form that the consumer may keep." 12 CFR § 226.17(b). Multiple copies of the form contract, which contained the required disclosures, were placed in front of Gavin before the transaction was finalized, and Gavin reviewed the contract. The district court did not err in granting judgment as a matter of law on this claim [that the disclosures were properly given].

District courts within the Fourth, Sixth and Seventh Circuits have considered, and interpreted in varying ways, the meaning of the Fourth Circuit decision in *Polk*.[3] At least eight more district courts have issued decisions involving *Polk* claims. In *Crowe v. Joliet Dodge and Union Acceptance Corp.*, 2001 WL 811655 (N.D. Ill. July 18, 2001), the court characterized as persuasive the reasoning of the decision in *Nigh*, in which another district court had held that "giving a buyer the credit terms on the form that he is to sign complies with the timing requirements of the Act . . .. The *Polk* court's goal was to clarify the timing issue of the statute, not to clarify the form of the disclosure (e.g. in the form of the RISC to be signed as opposed to in a separate writing." However, because the court was ruling on a motion to dismiss (as opposed to a summary judgment motion), the court was unwilling to rule that, under the limited statement of facts alleged, the dealer's actions or inactions would not constitute a TILA violation and, thus, concluded that "Plaintiff has adequately put Defendant on notice as to the claim for actual damages."[4]

In *Brugger v. Elmhurst KIA,* 2001 WL 845472 (N.D. Ill. July 24, 2001), the court held that an allegation that the dealer had not given the consumer "the required disclosures before he signed the deal in a form he could take with him" stated a claim under both TILA and the Consumer Fraud Act. Assuming *arguendo* that statutory damages were unavailable for the claim alleged, the court nevertheless concluded that the consumer "has adequately alleged actual damages – that he could have taken the

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[3] *See, e.g., Nigh v. Koons Buick Pontiac GMC, Inc.*, 2001 U.S. Dist. LEXIS 5374 (E.D. Va. Apr. 20, 2001); *Walters v. First State Bank*, 134 F. Supp. 2d 778 (W.D. Va. 2001); *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321 (W.D. Mich. 2000); *Holley v. Gurnee Volkswagen and Oldsmobile, Inc.*, 2001 WL 243191 (N.D. Ill. Jan. 4, 2001).

[4] The court dismissed a Consumer Fraud Act claim alleged against the assignee, ruling that the TILA claim based upon the timing of receipt of the disclosures was not the type of violation that would have been apparent on the face of the documents as signed and, therefore, could not be asserted against the assignee under the Consumer Fraud Act.

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disclosures and obtained better financing terms from some other source. Elmhurst's claim that this theory is far-fetched does not permit the Court to rule it out as a matter of law on a motion to dismiss."

In *Spearman v. Tom Wood Pontiac GMC Inc*., 2001 WL 987849 (S.D. Ind. July 30, 2001), the court held that "simply showing the consumer the TILA disclosures prior to consummation . . . does not constitute compliance" and that it was insufficient for the dealer to argue that the disclosures had been given to the consumer in retainable form because quadruplicate copies of the contract had been made available to her. The court noted that the provision of quadruplicate copies would support an argument that the disclosures had been furnished in retainable form *contemporaneously* with consummation, which would not constitute compliance with a requirement to provide them *prior to* consummation. Accordingly, the court held that the consumer was entitled to summary judgment on her TILA claim.

The attorneys for the defendant car dealer went back to The U.S. District Court, and asked the court to amend its finding to include the fact that the disclosures given to the plaintiff, Mary Spearman, did contain accurate Regulation Z disclosures. *Spearman v. Tom Wood Pontiac-GMC, Inc.,* 2001 WL 1712506 (S.D. Ind. Dec. 3, 2001). The purpose of their motion was to place the decision a form that would allow them to file an interlocutory appeal. The car dealer's counsel got more than they asked for. The District Court reversed itself on the decision on proper timing and delivery of the TILA disclosures. The court emphasized that "where the credit contact contains the TILA disclosures, nothing in *Polk* requires a creditor to separate the consumer's copy of the credit contract from the other copies of the contract and give the copy to the consumer before the consumer signs the contract [citing *Diaz,* below]."

In *Diaz v. Joe Rizza Ford, Inc.*, 2001 U.S. Dist. LEXIS 18198 (N.D. Ill. Nov. 2, 2001), the dealer's business practice was to provide customers with a completed three-copy form of the credit agreement after negotiating the terms of the sale and financing. Customers were permitted to review the form prior to signing it. Upon the customer's signature, the top copy would be separated from the other two copies and given to the customer. Plaintiff claimed that by following these procedures in connection with her purchase, the dealer violated TILA by not giving her a copy of the required disclosures in a form she could keep before consummation of the transaction. The dealer moved for summary judgment. In considering the dealer's motion, the court stated the following: "Read independently, [the provisions of TILA regarding the form of disclosures and the time for delivery] require that the disclosures be made before consummation of the transaction and that they be made in a form that the consumer may keep, but they do not necessarily require that the form be furnished to the customer before consummation of the transaction. The court so recognized in *Polk v. Crown Auto, Inc.*, supra, but it concluded that the provisions must be read together, with the form being furnished prior to the consummation of the transaction, in order to implement the purpose of TILA. We agree, but not to the extent that we invalidate defendant's procedures here.

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"The enhancement of the ability to comparison-shop is one purpose of TILA, *but not the only one*. The overriding purpose is to promote the informed use of credit, and requiring substantially similar and full disclosures in a form that the consumer may keep enhances the ability to custom-shop, reduces the likelihood of uninformed use of credit, and protects the consumer from subsequent changes in the terms. 15 U.S.C. § 1601. *Plaintiff here was informed, and was protected because she took away her copy. Further, there is nothing to suggest that she could have not taken away all three copies or the top copy, or notes of the terms, without executing them, if she had so desired. And, she was in physical possession of all three copies when she signed*. Presumably plaintiff would agree that defendant was in compliance with Regulation Z if it had removed the top copy at its perforations and handed it to her before she signed. But in any event, it was 'her' copy, and we fail to see any meaningful distinction between separation of the copies before or after she signed. Accordingly, we grant summary judgment for the defendant."

In another Indiana case, *Collins v. Ray Skillman Olds-GMC Truck, Inc.,* 2001 WL 1711466 (S.D. Ind. Dec. 3, 2001), the court set forth the facts on the timing and delivery in a much more clear fashion than in the other cases discussed in this paper.

> The contract was presented in quadruplicate form to the Collinses for their review, approval and signature. At the time it was presented, the contract contained the disclosures of which the substance and form are in the manner required by TILA and Regulation Z. One copy of the contract was designated buyer's copy. The Collinses did not ask for the buyer's copy or any other copy of the contract to keep prior to singing the contract. They were not offered to retain a copy before they signed. The buyer's copy of the Contract was not torn off and handed to them before they signed it.

A copy of the signed contract was given the Collinses. Also, there was testimony from one of the dealership's business managers that if a customer were to request a copy of the contract to take away with him prior to signing, or if the customer simply attempted to leave with a copy of the contract before signing it, he could do so. After discussing the requirement that the plaintiffs show actual damages, the court went on to discuss the timing of delivery issue. The court criticized *Polk* and the decisions that relied on *Polk, Walters v. First State Bank* and *Holley v. Gurnee Volkswagen & Oldsmobile,*[5] and like *Diaz* and *Spearman,* held that nothing in *Polk* nor TILA or Regulation Z requires the creditor to separate the consumer's copy of the credit contract from the other copies of the contract and give the copy to the consumer before the consumer signs the contract. The defendant's motion for summary judgment was granted.

In *Buie v. Palm Springs Motors*, 2001 U.S. Dist. LEXIS 13756 (C.D. Cal. May 14, 2001), plaintiff signed a retail installment agreement with an APR of 13.9%. However, the dealer could not arrange financing at 13.9%. Therefore, the dealer drafted

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[5] *See* fn. 2. *See also, Peter v. Village Imports,* Civil No. 01-12 (DSD/JMM) (D. MN Oct. 9, 2001).

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a new agreement with an APR of 18.5%. The plaintiff also signed the second agreement. The plaintiff sued the defendant auto dealer alleging violations of state and federal law. One of the plaintiff's allegations was that the dealer failed to provide the TILA disclosures before the agreement was consummated and therefore violated TILA. Plaintiff conceded that he received a copy of the agreement after he signed it. However, he claimed the dealer was required to provide him with the disclosures before he signed them. The dealer admitted that TILA requires the disclosures to be provided prior to consummation. However, it argued that the agreement was not consummated until a lender is identified. Therefore, the issue before the court was when, for TILA purposes, is an agreement consummated?

In determining when a consumer becomes contractually obligated, the court looked at the language contained in the agreement. The agreement provided that if the dealer was unable to assign the agreement to a financial institution, the dealer may rescind the contract. The dealer argued that this language makes the contact conditional on finding an assignee. However, the court did not interpret the language the same way. The court did not believe there was anything in the agreement that made it conditional on finding an assignee. The language relied on by the dealer simply permitted the dealer to rescind the agreement if the agreement could not be assigned to a financial institution. Additionally, the agreement expressly provided that the dealer would finance the purchase unless other financing can be found. The court concluded that the terms of the agreement make it clear that consummation occurred when the agreements were signed. As there was no triable issue of material fact, the court granted summary judgment in favor of the plaintiff on the TILA claim.

Finally, on January 23rd this year, the U.S. District Court for the Western District of Michigan certified a class of approximately 1200 claimants on a TILA timing of disclosures claim. *Daenzer v. Wayland Ford, Inc.,* 2002 U. S. Dist. LEXIS 1296 (W.D. MI Jan. 23, 2002). With regard to commonality, the court said that the main question common to the class was whether the defendant failed to provide individual class members with the disclosure prior to sale. "Because this is a question of fact, some individual inquiry will have to be done as to each class member, but that does not destroy the commonality of the question of fact. It is the same question for each class member, even if the answer may be different." Commonality of not, the bigger question is will each buyer remember whether she saw the disclosures first, signed next, got a copy last, or vice versa.

II. Exemptions from TILA Finance Charge Definition

Van Slee v. Don McCue Chevrolet GEO, Inc. and General Motors Acceptance Corp., 2001 WL 1035214 (N.D. Ill. September 10, 2001). This case involved a dealer that offered a $1,000 discount to cash purchasers. Plaintiffs sued the defendants claiming that the $1,000 discount offered to cash purchasers was a finance charge under TILA and should have been disclosed as such. The dealer did not dispute that the additional $1,000 that it allegedly charged credit customers would satisfy the general definition of a finance

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charge under TILA. However, it argued that the $1,000 discount falls within an exception, under Section 167(b) of TILA and 12 CFR § 226.4(c)(8), create for certain discounts offered to induce payment by cash, check or similar means. The plaintiffs argued that Section 167 is limited to transactions involving credit cards or other open-end credit plans.

TILA Section 167(b), which is entitled "Inducement to cardholders by sellers of cash discounts for payments by cash, check or similar means; credit card surcharge prohibition; finance charge for sales transactions involving cash discounts", provides as follows:

(a) *Cash Discounts.* With respect to credit cards which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

(b) *Finance Charge.* With respect to any sales transaction, any discount from the regular price offered by the seller *for the purpose of inducing payment by cash, check or other means not involving the use of an open-end credit plan or a credit card* shall not constitute a finance charge as determined under section 1605 of this title if such discount is offered to all prospective buyers and its availability is disclosed clearly and conspicuously.

15 U.S.C. § 1666f. The dealer's interpretation of Section 167 relied on the broad language of subsection (b) – "any sales transaction" – for its position that properly disclosed and universally offered cash discounts are not finance charges. Specifically, the dealer argued that the word "any" does not contemplate a limit on the type of sales transaction involved.

The plaintiffs, on the other hand, argued that both the title and other portions of the statutory language support their position. According to the plaintiffs, Congress intended to limit Section 167 to transactions involving credit cards. First, the title of the section refers to "cardholders," which TILA defines as "any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person." 15 U.S.C. § 1602(m). Second, subsection (b) describes the types of payments to be induced by means of a discount as "cash, checks or other means not involving the use of an open-end credit plan or a credit card." According to the plaintiffs, these aspects of the statute strongly suggest that the scope of the section is limited to those cash discounts that are offered as an alternative to open-end credit transactions.

The court acknowledged that neither position was without merit. The court, however, also considered the Comment to 12 CFR § 226.4(b)(9)-2, which states that the cash-discount exception is limited to "transactions involving an open-end credit plan or a credit card." The court recognized that the Federal Reserve Board's interpretation of the

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cash-discount provision is rational and should be credited. The court further stated that, while it is unclear why Congress might have intended to limit the finance charge exception to cash discounts involving credit card transactions, the Federal Reserve Board's interpretation is a reasonable one. Therefore, the dealer's motion to dismiss the TILA disclosure claim was denied.

III. Dealer Finance Charge Participation

Kunert v. Johnson Ford, Case No. BC-229917 (Calif. Super. Ct. Los Angeles County Oct. 9, 2001). Automobile purchasers challenged the payment by banks and finance companies of a "dealer reserve" in connection with their purchase of automobile retail installment contracts. The complaint alleged that when a dealer sells a conditional sales contract to a bank or finance company, the dealer violates the Rees-Levering Motor Vehicle Sales and Finance Act if it negotiates with the retail buyer for a higher APR than the "buy rate" (*i.e.*, the minimum rate at which a bank or a finance company will purchase a retail installment contract). The Complaint alleged that the difference between the buy rate and the APR constitutes a "commission or other remuneration" that is prohibited by Rees-Levering when the sales is partially financed by means of a third party "side loan". *See* Cal. Civ. Code 2982.5(b). The Complaint further alleged that payment of such an amount by the assignee bank or finance company allegedly is an unlawful practice violative of the California Unfair Competition Law (section 17200 of the California Business & Professions Code) and constitutes a form of price discrimination violative of the Unfair Practices Act.

The court dismissed the complaint, noting that plaintiffs' counsel "firmly maintained at oral argument that each of the claims asserted involve one transaction" whereas the Rees-Levering provision at issue -- Section 2982.5(b) – contemplated both a conditional sale contract and a third-party side loan for a portion of the amount due. Indeed, that provision requires that dealers disclose that the consumer is "obligated for the installment payments on ***both*** the conditional sale contract ***and*** the loan." Because the plaintiffs' counsel acknowledged that the transactions at issue did not involve dealer-assisted loans, Section 2982.5(b) was not applicable by its terms.

Moreover, the court dismissed the UPA claim and the section 17200 claim. The UPA price discrimination provision prohibits secret payments *to purchasers*, whereas the dealer reserve is a payment *from* a purchaser of a retail installment contract (the bank or finance company) to a seller (the dealer). The court held that "unlawful business activity" within the meaning of Section 17200 involves practices forbidden by law. Inasmuch as plaintiffs also did not state a viable claim under Section 2982.5(b) of Rees-Levering, the Section 17200 claim failed as well.

Geller v. Onyx Acceptance Corp., Case No. 728614 (Cal. Sup. Ct. San Diego filed August 9, 2001) (Tentative Decision), Judgment entered November 13, 2001. This case involved a class action claim that defendant engaged in unlawful, unfair and fraudulent business practices in violation of Cal. Bus. & Prof. Code §§ 17200 and 17045 by secretly

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paying dealer participations. The case also included an additional allegation that the defendant's conduct violated California's Rees-Levering Act, Cal. Civil Code § 2982.5(d). The court discussed in detail the history of dealer participation and Onyx's business model. The court then concluded that the business practices of the defendant did not violate the Rees-Levering Act and were not unlawful, unfair or fraudulent. In dismissing the plaintiff's claim, the court adopted the reasoning and determination of the Federal Reserve Board, which decided in 1977 not to require numerical or narrative disclosure of dealer finance charge participation. The Board believed such a disclosure would "not significantly enhance the consumer's ability to shop for credit," and "would likely lead to confusion."

IV. TILA Assignee Liability Provision and FTC Holder in Due Course Rule

Javorsky v. Freedom Driving Aids, Inc. and Ford Motor Credit Corp., 2001 WL 1002486 (N.D. Ill. Aug. 30, 2001). The court in this case followed numerous other decisions in holding that TILA's assignee liability provisions trump the FTC holder in due course rule. Plaintiff sued the defendants for alleged violations of TILA. Ford Motor Credit Corp. ("FMCC") filed a motion to dismiss, arguing that: (1) the TILA assignee liability provision trumps the FTC's holder in due course rule; (2) TILA provides for assignee liability only if the violation is apparent on the face of the document; and (3) the alleged violation was not apparent on the face of the document. Relying on the Seventh Circuit decision in *Walker v. Wallace Auto Sales, Inc.,* 155 F.3d 927 (7th Cir. 1998), the court agreed with FMCC and granted FMCC's motion to dismiss.

V. Detrimental Reliance Requirement for TILA Actual Damages

Cannon v. Cherry Hill Toyota, 2001 WL 1001498 (D.N.J. Aug. 29, 2001). Plaintiff claimed that defendant violated TILA by not disclosing the fact that it was retaining a portion of the amount charged for an extended warranty. The court agreed that failure to disclose the "upcharge" was a TILA violation. However, following the majority of other courts that have addressed the issue of the actual damages standard under TILA Section 130(a)(1), the court held that the plaintiff must make a showing of detrimental reliance in order to obtain actual damages under TILA. Plaintiff failed to make any such showing and therefore was not entitled to actual damages under TILA. In rendering its decision, the court relied on the elements of detrimental reliance quoted in *Peters v. Jim Lupient Oldsmobile*, 220 F.3d 915 (8th Cir. 2000): (1) whether the consumer had read the TILA disclosure statement; (2) whether he/she understood the charges being disclosed; (3) whether, had the disclosure statement been accurate, he/she would have sought a lower price; and (4) whether he/she would have obtained a lower price.

This decision is noteworthy in at least two additional respects. First, the court concluded that the plaintiff had failed to satisfy the third and fourth prongs of the *Peters*

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test where her testimony gave "no indication whatsoever that [she] would have sought or found a less expensive warranty plan if she had known about the upcharge." Specifically, the court stated that "Ms. Cannon's 'feeling' that the warranty was too expensive is not based on comparison shopping, or any knowledge of comparative pricing, and there is no indication in the record that she either knew or (with disclosure of the upcharge) would have known that a less expensive alternative was available."

Second, the court engaged in an analysis of the relationship between the TILA actual damages standard and the actual damages provision of the New Jersey Consumer Fraud Act ("NJCFA"), which provides for a damages award to any person "who suffers any ascertainable loss of moneys or property . . . as a result of . . . any method, act or practice declared unlawful under this Act." In this connection, the court rejected plaintiff's argument that "'ascertainable loss' under NJCFA is a broader concept tha[n] 'actual damages' under TILA." The court's discussion of this issue, which appears at pages *8 through 10 of the Westlaw version of the opinion, is relevant to state UDAP claims alleging a misrepresentation or a failure to disclose.

VI. TILA Payment Schedule Disclosure

Clay v. Johnson, 2001 WL 1008139 (7th Cir. Sept. 5, 2001). Plaintiffs signed three retail installment contracts that included the TILA disclosures. The disclosure of the payment schedule did not give a specific date but instead included the phrase "30 days from completion" of the construction work on the house. Plaintiffs filed a claim with the district court seeking to rescind the contracts and to recover statutory damages and attorneys' fees. The complaint alleged that the defendants failed to properly disclose the payment schedule because they did not disclose an exact date when the payments would be due or provide an estimate of the due date. The district court agreed with the plaintiffs and granted partial summary judgment in their favor.
The defendants filed a motion for reconsideration following the district court's decision. The defendants' argued that Comment 18(g)-4 to Regulation Z specifically states that a creditor may satisfy TILA by defining the beginning payment date by reference to the occurrence of a particular event rather than by disclosing a precise calendar date. The district court rejected the defendants' argument because Comment 18(g)-4 was not adopted until after the defendants had made their disclosures to the plaintiffs. The court held that the Comment could not be applied retroactively to validate the defendants' disclosure in this case.

The defendants appealed to the Seventh Circuit. The Seventh Circuit recognized the basic principle that if an agency promulgates a new rule that changes the substantive state of existing law, that rule is not retroactive unless Congress expressly authorized retroactive rulemaking and the agency clearly intended the rule to be retroactive. Therefore, if the addition of Comment (18)(g)-4 changed the substantive law, it could not be relied upon by the defendants. If, however, it merely clarified the state of the law as it existed at the time the contracts were consummated, it may be relied upon by defendants.

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To determine whether the addition of the Comment was a change in the law or simply a clarification of the law, the court considered the proposed version and the final version of the Comment. The proposed version required a specific date to be provided. However, in light of numerous letters received by the Board raising concerns about this requirement, the final version excluded the requirement that a specific date be provided. As it had with the proposed version of Comment 18(g)-4, the Board indicated that it intended for the final version of Comment 18(g)-4 to interpret and clarify a creditor's existing obligations under TILA and Regulation Z.

Accordingly, the court reasoned that the Comment represented a clarification of pre-existing law. Although the adopted Comment was inconsistent with the proposed Comment, it was a reasonable interpretation of Regulation Z and courts should defer to agency interpretations of the statutes they administer. Therefore, the court reversed the decision of the district court.

VII. Failure to Disclose Intent to Assign Retail Installment Contract Does Not Violate TILA

Person v. Courtesy Motors, Inc., Consumer Cred. Guide (CCH) ¶ 51,555, at 75,505 (W.D. Mich. Apr. 5, 2001). In this case, the court held that an automobile dealership did not violate TILA by failing to disclose its intent to assign a motor vehicle retail installment contract. In this case, the consumer was able to put down only $300 toward the purchase of a vehicle. In order to represent to potential assignees that the consumer had made a larger down payment, the dealer accepted a "trade-in" of one of its own vehicles, and indicated a $2,000 trade-in value on the contract while raising the sale price of the purchased vehicle by $1,700. When a representative of the finance company called the consumer several days later expressing an interest in purchasing the contract, the consumer explained the sham trade-in transaction and the finance company declined to purchase the contract. The consumer filed suit, alleging that the TILA disclosures were false because the credit offered was "fictional" and not intended to be extended. The court disagreed, holding that there was no "mirage-quality" to the financing because the contract did not give the dealer the right to void the contract in the absence of an assignment.

The court did, however, find a TILA violation in the dealer's failure to disclose as a finance charge the additional sales tax that resulted from the "trade-in" transaction. The court held that this transaction, "whether itself legal or illegal, was a transparent attempt to manipulate lending practices so as to make Plaintiff eligible for financing." Inasmuch as the trade-in transaction was intended solely to secure financing, the court indicated that the costs associated with that transaction should have been included in the finance charge.
Creative Ways to Increase Approval Ratings For Credit Applicants

In *Adams v. Berger Chevrolet, Inc.*, 2001 U.S. Dist. LEXIS 6174 (W.D. Mich. May 7, 2001), an employee (salesman) of the dealer used the credit reports of the plaintiffs, without their authority, in order to obtain credit for persons who were

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otherwise ineligible for financing. The plaintiffs sued the dealer for violations of the Fair Credit Reporting Act claiming that the dealer was liable under the theory of *respondent superior* and apparent authority for the acts of its employee. The defendant argued that it was not liable for the acts of the employee absent proof that the dealer approved of or consented to the acts.

In applying the doctrines of *respondeat superior* and apparent authority, the court determined that the dealer was responsible for the intentional and wrongful acts of its employee. The transactions appeared for all practical purposes like any other legal transaction conducted by the dealer and the credit reporting agency had no reason to know that something was wrong. Therefore, the dealer was bound to the transactions because of the apparent authority of the employee as manifest to the credit reporting agency. Further, the dealer was bound to the transaction under the doctrine of *respondeat superior*. The transactions in question were sales and leases of cars. As such, they were within the employee's regular duties as a sales person. The transactions also directly benefited the dealer by generating sales and lease revenues to the dealer. Therefore, the court concluded that the transactions were attributable to the dealer.
In reaching its holding, the court concluded that as between an innocent consumer and an employer, the "law favors an understanding of agency which shifts the costs of the injuries to the employer because the employer has ultimate control over both the hiring, tasking and supervision of the wrongdoing employee. This is all the more true as to consumer protection legislation, such as the FCRA, which was specifically designed to protect consumers and remedy wrongs done consumers related to credit reporting." Therefore, the fact that the dealer did not expressly authorize the conduct, did not immunize it from vicarious liability for willful violations by its employee. Accordingly, the court granted the Plaintiffs' motion for summary judgment.

VIII. Vehicle Spot Delivery – Rescission of Retail Installment Contracts

<u>Burns v. Elmhurst Auto Mall, Inc.,</u> 2001 U.S. Dist. LEXIS 6385 (N.D. Ill. 2001). Charmira Burns sued Elmhurst Auto Mall, Inc. alleging violations of Illinois state law, the federal Truth in Lending Act and the Equal Credit Opportunity Act. Elmhurst repossessed a vehicle purchased by Burns because Elmhurst was unable to secure financing on behalf of Burns for the purchase. Elmhurst moved to dismiss the federal claims and the UCC claim based on the repossession. The Court dismissed the UCC claim because it found that Elmhurst was the owner of the vehicle and had a right to possess the vehicle after it properly cancelled Burns' contract for lack of financing. The court also dismissed the TILA claim because the contract disclosures were accurate when given. The court denied the motion to dismiss with respect to the ECOA claim because it was unclear who had provided the adverse action notices required under the ECOA and Regulation B.

In connection with her purchase of a Kia Sephia from Elmhurst, Burns signed a retail installment contact and a document titled "Consent Rider for Inability to Finance." The Rider allowed Elmhurst to unwind the deal if it was unable to obtain financing. The

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Rider did not, however, indicate that the dealership or any third party financing company must notify Burns of the inability to obtain financing within a specific number of days after consummation of the transaction. Elmhurst repossessed the vehicle sometime before the first payment was due. According to the court, Elmhurst never notified Burns in writing that her financing application has been denied, nor did it inform her of the reasons her application was denied.

IX. "Optional" Credit Insurance Disclosure in Retail Installment Contract

London v. Chase Manhattan Bank USA, N.A., 2001 U.S. Dist. LEXIS 6888 (S.D. Fla. Mar. 30, 2001). Roger London applied for a credit card offered by Chase Manhattan Bank, N.A. through Wal-Mart, an arrangement referred to as a "co-branded credit card." In the process, the applicant initialed a line on the application indicating that he wanted to purchase "LifePlus," a package of life, disability, involuntary unemployment and leave of absence insurance coverages. The application referred to the insurance coverages as "optional." London brought a class action Truth in Lending Act claim against Chase asserting that Chase's characterization of the coverages as "optional" was insufficient under TILA to avoid having the cost of the coverages treated as a finance charge. When Chase moved for partial summary judgment, the U.S. District Court for the Southern District of Florida rejected London's argument that the credit insurance disclosures were required to parrot the language of the Act or the Regulation. The court concluded that the mere use of "optional" without more, was insufficient under TILA to exclude the charges from the finance charge. The court concluded that it was "clear that a reasonable applicant could understand" that while the applicant was not required to obtain credit, Chase nevertheless could choose to consider the applicant's decision to enroll or not enroll in the insurance program in its decision to approve the application for a credit card.

X. Consumer Leasing Act – Reg. M/Leasing

Clement v. American Honda Finance Corp., 145 F. Supp. 2d 206 (D. Conn. 2001). The opinion of the Court in this case deals with "old" (the 1992 version) Regulation M. (Regulation M, 12 CFR 213, was effective October 31, 1996, compliance optional until January 1, 1998). Jean Clement sued American Honda Finance Corp., asserting that the early termination provisions in her lease failed to comply with the Consumer Leasing Act and old Regulation M requirements that early termination penalties be disclosed in a "clear and conspicuous" manner. Clement moved for summary judgment, which the court granted, placing heavy reliance on the Second Circuit's opinion in *Lundquist v. Security Pacific Automotive Financial Services Corp.,* 993 F.2d 11 (2d Cir. 1993).

Rather than follow the standard set for disclosures of early termination liability in the 7th Circuit (*citing Channell v. Citicorp Nat' Serv., Inc.,* 89 F.3d 379, 383 (7th Cir. 1996)), the Court was bound to follow the standard set forth in *Lundquist,* 993 F.2d at 15. That standard is based on an interpretation of the fact that termination disclosures must

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"be reasonably understandable" – interpreting the requirements of the Consumer Leasing Act and Regulation M that disclosures be made "accurately and in a clear and conspicuous manner," 15 U.S.C. § 1667a, "in meaningful sequence," 12 CFR § 213.4(a)(1), and in "a reasonably understandable form," 12 CFR pt. 213, supp. I, § 213.4(a)(1) (Official Staff Commentary). Finding that "too many concepts piled into a single paragraph" created a problem with understanding paragraph 10 in the lease, and as a result, the early termination disclosures failed the test. See also *Applebaum v. Nissan Motor Acceptance Corp.,* 1999 WL 23660 (E.D. Pa. 19099) *overruled on other grounds,* 226 F.3d214 (3rd Cir. 2000).

XI. California Leasing Act "Single Document" Rule

Trygar v. HAK, Inc., dba Keyes European, Los Angeles County Superior Court, Case No. BC236185 (filed Sept. 1, 2000). This case, with 25 pages naming defendant car dealers in California ad defendants, involves a "single document" challenge to the "payoff adjustment" form for the handling of arrangements for the trade-in vehicle in connection with a consumer motor vehicle lease.[6] Plaintiffs allege that the separate form documenting the lessee's representation that the payoff information furnished about the trade-in vehicle is correct violates the "single document" rule contained in the California Vehicle Leasing Act, which provides that the lease agreement must contain "in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party."

Because of the extensive ramifications of the case -- the payoff adjustment forms have been used extensively in California -- the California legislature enacted a statute to clarify the "single document rule" in the Act. Governor Davis signed the bill into law in October 2001, and the law will become effective January 1, 2002. It will apply to leases entered into on or after January 1, 2002 and thus will not affect the pending single document rule action.

Under the new law, lease forms used in California must provide more detail with regard to the itemization of the gross capitalized cost. The existing "single document rule" remains intact, but a new section is added to the Vehicle Leasing Act, which provides that certain documents and agreements need not be contained in a lease contract. These excluded documents are: express written warranties; titling and transfer documents; insurance policies, service contracts and optional debt cancellation agreements; and, documents that memorialize the sale or lease of goods or services related to the leased vehicle, provided that such items are separately itemized as to type and amount in the itemization of the gross capitalized cost.

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[6] The case grew out of the court's holding in *Kroupa v. Sunrise Ford,* 77 Cal. App. 4th 835, 92 Cal. Rptr. 2d 42 (1999), that under the California Vehicle Leasing Act, all agreements between lessees and lessor pertaining to vehicle lease were required to be included in single document, including arrangements regarding trade-ins, cash payments, and the lessor's assumption of negative equity from the trades.

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XII. New Jersey Court Certifies Classes on Late Fees, Monthly Payments After Expiration

Targovnik v. First Union Auto Finance, Inc., New Jersey Superior Court, Bergen County, Docket No. L-6465-98. The New Jersey Superior Court for Bergen County has certified two multi-state classes of lessees. On February 6, 2002, the court certified a class of lessees from whom First Union has charged or collected a 7% late fee. The second class certified consists of lessees from whom First Union collected a lease payment for the month after the lease terminated.

XIII. Magnuson-Moss Does Not Apply to New York Lease

The New York Court of Appeals held that the federal Magnuson-Moss Warranty Act does not apply to lease vehicles. The court engaged in a review of the federal Magnuson-Moss Warranty Act, including the legislative history, and determined that the Act only applies to "sales." *DiCintio v. DamilerChrysler Corporation,* 2002 N.Y. LEXIS 153 (Feb. 13, 2002).

XIV. Certification of Nationwide Class

Washington Mutual Bank, F.A. v. Superior Court, 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071, (2001). In this action, plaintiff sought nationwide class certification against American Savings Bank, F.A. ("ASB") (which was acquired by Washington Mutual), challenging ASB's forced placed property insurance program, *i.e.*, the insurance purchased by ASB when a borrower failed to maintain hazard insurance on the property securing his or her loan. Washington Mutual argued that a nationwide class action could not be certified because, pursuant to the choice-of-law provision in the borrower's form deeds of trust, the laws of the fifty states must apply. The choice-of-law provision provided that the agreement was "governed by federal law and the law of the jurisdiction in which the [secured property] is located." Notwithstanding the express choice-of-law provision, the trial court granted plaintiff's motion to certify a nationwide class and the Court of Appeal affirmed.

Reversing nationwide certification, the California Supreme Court addressed the following two issues presented by Washington Mutual: "First, what is the appropriate analysis for selecting applicable law in a class action where putative class members have contractually agreed to application of another state's law? Second, what analysis must be undertaken in the event litigation of the class action will necessitate application of the laws of multiple states?"

With respect to the first issue, the Court completely adopted Washington Mutual's position that, in determining whether common issues of law predominate for certification of a nationwide class based on claims involving an underlying contractual choice-of-law provision, a trial court "must apply the analysis set forth in [*Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (1992)], to evaluate disputed claims that class causes of action are subject to enforceable choice-of-law agreements" (emphasis added.) The

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Nedlloyd analysis involves two steps. First, the court should determine either: "(1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law." *Nedlloyd*, 3 Cal. 4th 466. Second, if either test is met, "the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law." *Id.* If there is a conflict of fundamental public policy, the court weighs the interests of the two competing states in order to determine the applicable law. *Id.* Although *Nedlloyd* involved a contract negotiated between two sophisticated parties, the Supreme Court in *Washington Mutual* expressly rejected the argument that the *Nedlloyd* analysis is not applicable to form consumer contracts, finding that the *Nedlloyd* analysis "is properly applied in the context of consumer adhesion contracts." The Court also specifically rejected the "Court of Appeal's suggestion that California businesses dealing with mass groups of consumers should not be permitted to rely on choice-of-law clauses as a means of avoiding involvement in a nationwide class action." In this regard, the Court recognized that, "an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multistate or nationwide class action or result in the exclusion of nonresident consumers from a California-based action."

With respect to the second issue – what analysis should be undertaken where multiple states' laws will apply in a class action – the Supreme Court confirmed that the burden rests squarely with the proponent of class certification to demonstrate, "through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance." The Court explained that "the proponent's presentation must be sufficient to permit that the trial court, at the time of certification, to make a detailed assessment of how any state law differences could be managed fairly and efficiently at trial, for example, through the creation of a manageable number of subclasses," and that the trial courts "cannot accept 'en faith' an assertion that variation in state laws relevant to the case do not exist or are insignificant; rather, the party seeking certification must affirmatively demonstrate the accuracy of the assertion." Further, the Court soundly rejected plaintiff's argument that "a defendant should not be able to defeat nationwide class certification without affirmatively showing the existence of outcome-determinative differences among applicable state laws." To this end, the Court emphasized that "certification of a nationwide class is not a matter of right but is contingent upon a showing that all prerequisites for a class action are met."

Addressing issues raised by *amici curiae*, the Court also considered the proper analysis to be applied when no choice-of-law provision is provided, or if the choice-of-law provision relied upon is not applicable or enforceable. The Court concluded that the burden is on the party invoking the application of foreign law (which typically is the defendant in a nationwide class action) to demonstrate that other states' laws should apply to satisfying the requisite elements of the "governmental interest" test.

The Supreme Court opinion should have a significant impact on the certification of nationwide class actions throughout California. In the words of the Court, the Opinion provides "an analytical framework for evaluating the basic choice-of-law and conflict of

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laws issues that must be resolved when certification of a nationwide or multistate class action is sought." Under *Nedlloyd*, a choice-of-law clause stating that the parties' agreement is "governed by" the law of a certain state was held to have broad application. See *Nedlloyd*, 3 Cal. 4th at 470 (holding that "a valid choice-of-law clause, which provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses all clauses of action arising from or related to the agreement, regardless of how they are characterized").

XIII. Arbitration Clauses in Consumer Contracts

Green Tree Financial Corp. v. Randolph, 121 S. Ct. 513 (2000), addressed whether an arbitration clause in a consumer lending agreement, which was silent with respect to the allocation of arbitration costs, was unenforceable because it allegedly failed to protect the consumer from potentially steep arbitration expenses. Enforcement of the arbitration provision would also preclude plaintiff from asserting a class action.

In *Green Tree*, plaintiff financed the purchase of a mobile home through defendants pursuant to a finance/security agreement that required plaintiff to purchase vendor's single interest insurance, which protects the vendor or lienholder against the costs of repossession in the event of default. Plaintiff sued defendants for allegedly violating TILA by failing to disclose the vendor's single interest insurance as a finance charge. Rejecting plaintiff's argument that she lacked the resources to arbitrate, the trial court granted defendants' motion to compel arbitration and dismissed plaintiff's claims with prejudice. The Eleventh Circuit reversed, reasoning that the arbitration agreement was unenforceable because it was silent as to the allocation of arbitration costs and, therefore, failed to provide the minimum guarantee that plaintiff could vindicate her statutory rights under TILA; i.e., plaintiff's ability to vindicate her statutory rights would be undone by potentially "steep" arbitration costs. The Supreme Court reversed the Eleventh Circuit's decision in this regard and found the arbitration provision enforceable. The Court rejected plaintiff's contention that the arbitration agreement's silence with respect to costs posed a "risk" that she would be required to bear prohibitive costs and therefore be unable to vindicate her statutory rights. The Court declined to address plaintiff's alternative argument that the arbitration agreement was unenforceable because it precluded her from bringing class action claims under TILA, noting that this issue was not properly before the Court.

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